

No. 14,534

IN THE

United States Court of Appeals
For the Ninth Circuit

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,

LYNN W. KIRKLAND,
Assistant United States Attorney,
Anchorage, Alaska,
Attorneys for Appellee.

FILED

JUL 27 1955

PAUL P. O'BRIEN, CL

Subject Index

	Page
Jurisdiction	1
Statement of the Case	2
Statement of Points Relied On.....	2
Argument	3
I. The court did not err in holding that the license issued on the 21st day of July, 1953, and revoked on the 12th day of October, 1953, was not subject to reissue and renewal	3
Conclusion	9

Table of Authorities Cited

Cases

	Pages
Muncy v. Collins, et al., 132 Iowa 50, 106 NW 262.....	7
Pisar v. State, 56 Nebraska 455, 76 NW 869.....	7
State v. Moore, 67 W.Va. 559, 68 SE 177.....	6
State v. Seibert, 97 Mo. App. 212, 71 SW 95.....	7

Statutes

Alaska Compiled Laws Annotated (1949) :	
Section 19-1-1, as amended.....	8
Section 35-4-13, as amended.....	1, 5
Session Laws of Alaska (1953) :	
Chapter 116	3, 5, 7, 8
Chapter 131	1, 5
U. S. C. A., Title 48, Section 292 (48 Stat. 583).....	1

Texts

Black on Intoxicating Liquors, Section 99, page 223.....	7
48 CJS, Intoxicating Liquors, Section 99, p. 223.....	8

No. 14,534

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

**On Appeal from the District Court for the
Territory of Alaska, Third Division.**

BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdictional statement regarding the jurisdiction of the District Court as set forth by appellants is correct.

However, under Section 35-4-13, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 131, Session Laws of Alaska, 1953, the decision of the District Court on hearings on applications for liquor licenses is made final and no appeal is permitted. By Section 292, 48 United States Code Annotated, 48 Stat. 583, it is provided in part as follows:

“No spirituous or intoxicating liquors shall be manufactured or sold in the Territory of Alaska,

except under such regulations and restrictions as the Territorial Legislature shall prescribe, and the legislative power and authority conferred upon the Legislative Assembly of the Territory of Alaska by sections 21-24, 44, 45, 67-73, 79-90, and 145 of this title, shall be, and is, extended to include any legislation pertaining to the manufacture or sale of spirituous or intoxicating liquor within the said Territory, and any provision contained in the said sections, in conflict herewith, is expressly repealed: . . .”

Therefore, appellee moves to dismiss this appeal for the reason that the United States Court of Appeals for the Ninth Circuit does not have jurisdiction in this matter.

STATEMENT OF THE CASE.

The statement of the case as set forth by appellants is substantially correct.

STATEMENT OF POINTS RELIED ON.

I.

The Court did not err in holding that the license issued on the 21st day of July, 1953, and revoked on the 12th day of October, 1953, was not subject to re-issue and renewal.

ARGUMENT.

- I. THE COURT DID NOT ERR IN HOLDING THAT THE LICENSE ISSUED ON THE 21st DAY OF JULY, 1953, AND REVOKED ON THE 12th DAY OF OCTOBER, 1953, WAS NOT SUBJECT TO REISSUE AND RENEWAL.

Appellants did not appeal the order of October 12, 1953, revoking their license and should not be allowed to do so in this proceeding, however, to answer appellants' argument, we wish to point out that appellants in their brief on page 4 admit that their establishment is within a quarter of a mile of a church and a school and that they are not entitled to the license issued to them December 31, 1953, unless they come within the exception to Chapter 116 SLA 1953, as set out in counsel's brief on page 5. Appellants only claim to rights under the exception is the license to sell intoxicating liquors that appellants held from July 21, 1953, until its revocation on October 12, 1953.

An examination of the record relating to the license issued July 21, 1953, indicates the following: That on the 13th day of March, 1953, the applicants filed an application for a L B & W license under file No. 3750. That a hearing on said application was commenced on the 4th day of May, 1953 (R. 35). On May 27, 1953, applicants filed a motion to withdraw their application without prejudice to make another application for reasons as set forth in the record, one of them being that the census and consent petition did not comply with the law (R. 36). That on the 16th day of June, 1953, the Court signed an order permitting the applicants to withdraw the pending application without prejudice to the rights of the applicants to file a new applica-

tion and petition (R. 36) and on the 29th day of June, 1953, by affidavit, one of the applicants Tony Bordenelli filed a supplemental consent petition. On the 21st day of July, 1953, a license was issued by the Honorable J. Earl Cooper, District Judge, of Nome, Alaska (R. 36). That on September 5, 1953, an order to show cause why the license should not be revoked was signed by the Honorable George W. Folta, District Judge, for the reason that in the issuance of the license the law was not complied with in the following particulars:

1. No application was on file, the original having been denied and withdrawn.
2. No hearing upon any application was set.
3. The protestants were not notified.
4. The Court failed to consider any application before granting the license.
5. The Court failed to consider the protest on file.
6. The census and list of persons consenting to the issuance of the license failed to comply with the law which became effective June 30, 1953 (R. 37).

On October 12, 1953, the said license was revoked for the reasons stated in the order to show cause (R. 37). There was no appeal from that order.

The record clearly indicates that at the time of issuance of the said license on July 21, 1953, that there was no application on file and that the Court, therefore, could not have considered any application at the time of issuing the license. The real question to be decided by this Court is, Does the holder of a liquor license that has been issued without compliance to

Territorial statutes give the holder of that license such rights as to bring them within the exception to Chapter 116 SLA 1953? Appellee contends that a license to sell intoxicating liquors, if not issued in accord with the laws regulating the issuance of liquor licenses, could not be construed as giving the licensee a legal right to sell liquor and by no stretch of the imagination, could it be said that the licensee or premises were "authorized by law" to sell intoxicating liquors. In regulating the licensing and sale of intoxicating liquors, the legislature has prescribed certain requirements which must be complied with before a license can be issued. Section 35-4-13, ACLA 1949, sets forth the requirements and the contents for the application of a liquor license. The statute states that it must be shown in the application that certain requirements such as consent of residents over the age of twenty-one (21) years residing within a certain area have consented to the issuance of the license and that no license shall be granted in the absence of such evidence. The statute also provides that at the time set for the hearing, that the Court shall consider the application and any protest that may be filed against the same and shall also hear the applicant or others appearing in connection with the matter and give its judgment which shall be final. Section 35-4-13 was amended by Chapter 131 SLA 1953, in numerous aspects concerning the issuance of a license to sell intoxicating liquors, however, the act amending 35-4-13, retained the provision for an application and also retained the sentence stating "that no license shall be granted in the absence of the evidence of the con-

sent of citizens over the age of twenty-one (21) years residing in a certain area.” The amendatory statute also retained the section pertaining to the hearing, “The Court shall consider the application and any protest that may be filed against the same and shall also hear the applicant or others appearing in connection with the matter, and give its judgment, which shall be final.”

The legislature in regulating the issuance of liquor licenses prescribed certain requirements to be complied with before the Court could issue a license to sell intoxicating liquor. Those requirements were not complied with and the Court was without jurisdiction to issue the license, the action of the Court was void. In *State v. Moore*, 67 W.Va. 559, 68 SE, 177, a license to sell intoxicating liquor had been granted to one U. S. Moore. A statute of West Virginia required that an applicant for a license to retail intoxicating liquors should file a petition with the Clerk of the County Court “at least thirty (30) days before the session of said Court at which the same may be heard.” Moore filed his petition with the Clerk of the County Court and a hearing was held twenty-six (26) days after the petition was filed. The Court granted the license to Moore and Moore was indicted, while holding this license, for selling intoxicating liquor without a license. Moore was convicted and appealed on the ground that when the Court grants a license, it is not void, but good until revoked and that no collateral attack could be made upon it. The Supreme Court of Appeals of West Virginia held: That with-

out compliance with the statute in the filing of the petition for the time fixed, the County Court had no jurisdiction or power to act, and that the action of the Court was void and afforded no protection to the holder of the license as a defense to the indictment for selling intoxicating liquors without a license. For other authorities that hold that statutory requirements for the issuance of liquor licenses are jurisdictional and must be complied with in all respects, see *Muncy v. Collins, et al.*, 132 Iowa 50, 106 NW 262; *State v. Seibert*, 97 Mo. App. 212, 71 SW 95; *Pisar v. State*, 56 Nebraska 455, 76 NW 869; *Black on Intoxicating Liquors* #158. The record in this case indicates that there was no application on file at the time of the issuance of the said license on July 21, 1953 (R. 36 and 37). The weight of authority holds that statutory requirements must be met and in the event they are not, the action of a Court in issuing a license is completely void and without effect. If the Court were without jurisdiction to issue the license on July 21, 1953, then the license issued July 21, 1953, gave the applicants no rights whatsoever and would not bring the applicants within the exception to Chapter 116 SLA 1953, because the applicants were at no time "authorized by law to sell intoxicating liquors."

Appellant on page 8 of his brief asserts that the license issued July 21, 1953, was properly issued even though it was issued after Chapter 116 SLA 1953, became effective. Chapter 116 SLA 1953 provided that no license should be issued for the sale of

intoxicants in any building within one quarter of a mile of any church building or school ground where such church building or school ground is located outside a corporate municipality. Appellants' establishment was located less than one quarter of a mile from a church (R. 3, 59-60, 63, 65-66). Effective date for Chapter 116 SLA 1953, controlled by the Organic Act of the Territory of Alaska, being June 30, 1953. Appellants could have obtained no rights under the General Savings Clause statute, 19-1-1 ACLA 1949, as the record indicates that the application filed on March 13, 1953, was withdrawn and no new application filed (R. 36 and 37). Assume arguendo that the application filed March 13, 1953, had not been withdrawn and had remained on record. Appellants by the mere filing of their application on March 13, 1953, obtained no such right as is mentioned in section 19-1-1 ACLA 1949. The following statement is found in 48 CJS Intoxicating Liquors Section 99, at page 223, "A liquor license is a temporary permit or privilege issued in the exercise of the police power of a state to engage in a specified liquor business which would otherwise be unlawful. It is a matter of privilege rather than of right, personal to the licensee, and is neither a right of property nor a contract or contract right in the legal or constitutional sense of those terms."

CONCLUSION.

The Court did not err in holding that the license issued on the 21st day of July, 1953, was not subject to reissue and renewal for the reason that the Court in issuing the said license on July 21st, 1953, acted without jurisdiction and there was, therefore, nothing in existence to be reissued or renewed.

Dated, Anchorage, Alaska,
July 15, 1955.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

LYNN W. KIRKLAND,

Assistant United States Attorney,

Attorneys for Appellee.

